Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

LINDA J. DOYLE,

Petitioner,

vs.

JEFFERSON COUNTY, *et al.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether Petitioner's claims of discriminatory and retaliatory discharge are precluded under the doctrines of res judicata and collateral estoppel where the respondent failed to properly raise these affirmative defenses in its pleadings.

B. Where Petitioner was terminated after a hearing before the Jefferson County Personnel Board; where plaintiff appealed the termination to the Circuit Court (state court) whose review of the case was limited by law to a "review of the record," whether the United States District Court is barred from hearing the issues of whether the discharge was discriminatory and retaliatory.

PARTIES TO THE PROCEEDINGS

In addition to the party named in the caption, the following parties are also Respondents:

Jim Gunter, Defendant (County Commissioner, Jefferson County)

David Hatcher, Defendant (employee, Jefferson County)

H. William Lacy, Defendant (employee, Jefferson County)

Patricia N. Moore, Defendant (employee, Jefferson County)

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Petitioner, Linda J. Doyle, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not published (Appendix A). The opinion of the United States District Court for the Northern District of Alabama, Southern Division is included as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on January 15, 1998 (Appendix A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1738 provides in part:

> The records and judicial proceedings of any court of any State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full

> faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000-2(a) provides in part:

> It shall be unlawful employment practice for an employer . . . to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a) provides in part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. Background of the Case

On February 21, 1991, Linda J. Doyle, Petitioner, filed a Complaint under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000, *et seq.* On March 8, 1991, Linda

J. Doyle filed an Amended Complaint. The Complaint was filed pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000, *et seq.* and the Act of Congress known as the "Civil Rights Act of 1866," 42 U.S.C. § 1981 and § 1983. [Plaintiff's claims under 42 U.S.C. § 1981 and § 1983 have been withdrawn.]

Linda J. Doyle's Complaint was filed to correct unlawful employment practices on the basis of race to make whole Linda J. Doyle who was discharged from her employment after she opposed racially discriminatory employment practices.

Linda J. Doyle, Petitioner, is an African American citizen of the United States; she is a resident of the City of Birmingham, Jefferson County. Linda Doyle was employed by the defendant, Jefferson County, in the Office of Planning and Community Development, at its facility in Birmingham, Alabama, prior to her termination on January 1, 1990.

Respondent, Jefferson County, is a political subdivision of the State of Alabama. The Office of Planning and Community Development is an organizational division of Jefferson County, Alabama. At all times relevant to this action, Respondent maintained and operated a facility in Birmingham, Alabama. Respondent is an employer within the meaning of 42 U.S.C. § 2000e in that Respondent is engaged in an industry affecting commerce and employs at least fifteen (15) persons.

Petitioner stated in her Complaint that Respondents unlawfully discriminated against her on the basis of her race, black, in that on or about August 30, 1988, she was demoted. During the months preceding the demotion, Plaintiff was harassed and intimidated by the Director of the Office of Planning and Community Development, H. William Lacy and others.

Petitioner stated in her Complaint that Defendants unlawfully discriminated against her in that on or about August 1988, she was denied a promotion to the position of Principal Planner; and that no reasons were given for the denial of the promotion.

Petitioner stated in her Complaint that she was discriminated against on the basis of her race, black, in that on or about September 14, 1988, Petitioner received a low evaluation. On September 21, 1988, Petitioner was disciplined for insubordination and suspended for five (5) days, and Petitioner's salary was reduced effective May 1, 1989. On December 1, 1989, Petitioner was informed that she would be discharged effective January 1, 1990. Petitioner was discharged.

Petitioner stated in her Complaint that she was discriminated against because of her race; and that other employees who are Caucasian were not treated similarly.

Petitioner alleged in her Complaint that Respondents retaliated against her in violation of Section 704(a) of the Civil Rights Act of 1964, as amended, because she opposed employment practices which she believed to be discriminatory, and because she had filed a charge of discrimination with the Equal Employment Opportunity Commission. Said charge of discrimination was filed on or about August 31, 1988.

In her Complaint, Linda J. Doyle, asked that the Respondents be enjoined from engaging in employment practices shown to be racially discriminatory; retaliatory or arbitrary and capricious; that she be reinstated to her former position of Housing Coordinator; that she be given seniority which she would have earned if she had not been terminated; that she be awarded such other relief as may be necessary and proper, including, but not limited to appropriate back pay, front

pay, interest, lost benefits, compensatory damages, attorney fees, costs and expenses.

On April 15, 1992 the case was tried before Judge U. W. Clemon. Jefferson County Personnel Board was dismissed from the case. The trial concluded on April 16, 1992, at which time Judge Clemon took the case under submission as of May 18, 1992. On December 31, 1992, Judge Clemon recused himself from the case. The case was reassigned to Judge Sam C. Pointer. The parties agreed to submit the case for decision on the transcript of the trial that took place before Judge Clemon.

B. The Proceedings Below

The District Court found that Respondents failed to properly raise the affirmative defenses of res judicata and collateral estoppel in any of their pleadings. However, the court found that Petitioner's discharge claim is precluded under 28 U.S.C. § 1738, as analyzed through the doctrines of res judicata and collateral estoppel.

The District Court found that the Defendant's treatment of Petitioner was in retaliation for Plaintiff's filing an EEOC charge of race based discrimination. The court found that such retaliation violated Title VII, 42 U.S.C. § 2000, *et seq*. The Court found in favor of Petitioner, Linda J. Doyle, on the counts of wrongful demotion, low evaluation, discipline for insubordination and suspension for five days, and reduction in pay.

Petitioner appealed the final Order of the District Court dated October 30, 1996 denying her claim for unlawful termination on the basis of her race and in retaliation for Plaintiff's filing an EEOC charge of race discrimination.

In an opinion filed January 15, 1998, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THERE APPEARS TO BE NO PRECEDENT DIRECTLY ON POINT REGARDING THE ISSUE OF WHETHER PETITIONER'S CLAIMS OF DISCRIMINATORY AND RETALIATORY DISCHARGE ARE PRECLUDED UNDER THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL WHERE THE RESPONDENT FAILED TO PROPERLY RAISE THESE DEFENSES IN ITS PLEADINGS.

Petitioner's claim of discriminatory and retaliatory discharge are not precluded under the doctrines of res judicata and collateral estoppel because the defendant failed to properly raise these affirmative defenses.

Respondents failed to raise the defenses of res judicata and collateral estoppel in their pleadings; therefore Petitioner's claim of discriminatory discharge is not precluded under the doctrines of res judicata and collateral estoppel. The District Court found that the respondents failed to properly raise the affirmative defenses of res judicata and collateral estoppel in any of their pleadings. Res judicata and collateral estoppel are affirmative defenses and as such must be expressly pleaded and included in the pretrial order or are waived. *See Exxon Corp v. Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 507 n.3 (5th Cir. 1980).

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE PETITIONER DID NOT RECEIVE A TRIAL ON THE MERITS OF THE CASE BEFORE A STATE COURT BECAUSE THE STATE COURT'S REVIEW OF THE CASE WAS LIMITED BY LAW TO A REVIEW OF THE RECORD. PETITIONER DID NOT HAVE A FULL AND FAIR OPPORTUNITY TO LITIGATE THE CLAIMS OF DISCRIMINATORY AND RETALIATORY DISCHARGE IN THE STATE COURT.

Where Petitioner was terminated after a hearing before the Jefferson County Personnel Board; where plaintiff appealed the termination to the Circuit Court (state court) whose review of the case was limited by law to a "review of the record," the petitioner did not have a full and fair opportunity to litigate the claims of discriminatory and retaliatory discharge.

The District Court made the following findings of fact:

> After her termination in December 1989, Plaintiff appealed the dismissal to the Jefferson County Personnel Board. A hearing before the Personnel Board was held on January 11, 1990, where Plaintiff was represented by counsel; and on January 19, 1990, the Personnel Board upheld Plaintiff's discharge. Plaintiff then appealed to the Circuit Court of Jefferson County, Alabama, where a three-judge panel *reviewed the record* and heard oral arguments on June 4, 1991 [emphasis added]. On June 14, 1991, the Circuit Court affirmed the decision of the Personnel Board.

In the District Court's Opinion, the Court cited *Kremer v. Chemical Construction Corp.* for the proposition that federal courts will not be precluded from hearing a case where a party did not have a full and fair opportunity to litigate the claim or issue decided by the first court. 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262, 28 F.E.P 1412, *rehearing denied*, 458 U.S. 1133 (1982).

In *Kremer*, the Court decided the issue of whether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim as meritless when the state court's decision would be res judicata in the State's own courts.

In *Kremer*, the Supreme Court affirmed the result reached by the Second Circuit, holding that giving preclusive effect to state court decisions is required by 28 U.S.C. § 1738. Kremer had originally filed his charge of national origin and religious discrimination with the EEOC, which referred the charge to the New York State Division of Human Rights (DHR). The DHR concluded that there was no probable cause to believe that Kremer had been the victim of discrimination. Kremer appealed this determination to the DHR Appeal Board and to the Appellate Division of the New York Supreme Court, both of which sustained the DHR's determination as not arbitrary or capricious. Kremer, upon receipt of his right-to-sue notice from the EEOC, filed a Title VII action in federal district court. The district court dismissed his action as precluded by the outcome of the state proceedings and the Second Circuit affirmed. The Supreme Court affirmed the Second Circuit.

Kremer can be distinguished from the instant case as follows:

1. Kremer's case was investigated by a state agency charged with enforcing the New York law prohibiting employment

discrimination. In the instant case, Linda Doyle's case was decided by the Jefferson County Personnel Board which is not a law enforcement agency of the State of Alabama; and the Personnel Board is not charged with enforcing laws prohibiting discrimination.

2. In *Kremer*, the defendant properly raised the affirmative defense of res judicata in it's pleadings. *In the instant case, the respondent's did not raise the affirmative defense of res judicata in its pleadings.*

In the instant case, after her termination in December 1989, Plaintiff, Linda Doyle, appealed the dismissal to the Jefferson County Personnel Board. After a hearing, the Personnel Board upheld Plaintiff's discharge.

The Jefferson County Personnel Board has no similarity to the state agency in the *Kremer* case which was charged with enforcing the New York law prohibiting employment discrimination. In the *Kremer* case, the state agency made a specific finding regarding Kremer's claim of discriminatory practices. In the instant case, no state agency or state court has investigated, nor made a specific finding regarding Linda Doyle's claim of discriminatory and retaliatory discharge.

In the instant case, the Jefferson County Personnel Board did not consider the merits of the Petitioner's claim of termination based on discrimination and retaliation. Since the discrimination claim, not the validity of the state agency's decision, is the issue before the federal court, under § 1738 the state court's decision by itself cannot preclude a federal Title VII suit.

The District Court also cited *Gorin v. Osborn*, 756 F.2d 834 (11th Cir. 1985) for the proposition that federal courts will

not be precluded from hearing a case where a party did not have a full and fair opportunity to litigate the claim or issue decided by the first court. Gorin filed a lawsuit in federal district court with under 42 U.S.C. § 1983 based her discharge. The district court granted summary judgment for the defendant on the ground that the claim was precluded by earlier proceedings before the State Personnel Board on the same discharge. *Gorin* can be distinguished from the instant case in that *Gorin* filed a claim in federal district court under 42 U.S.C. § 1983. In the instant, Linda Doyle filed a Complaint under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000, *et seq.*, which affords procedures and protections substantially different from 42 U.S.C. § 1983.

CONCLUSION

This case presents a question of a compelling nature because there appears to be no precedent directly on point regarding the issue of whether petitioner's claims of discriminatory and retaliatory discharge are precluded under the doctrines of res judicata and collateral estoppel where the respondent failed to properly raise these affirmative defenses. Respondent failed to raise the doctrines of res judicata and collateral estoppel in any of their pleadings. Plaintiff's complaint was filed on February 1, 1991. After a substantial amount of motion practice, Respondent sought to amend its pleadings to include the defenses of res judicata and collateral estoppel. Respondent sought to amend its pleadings more than one year after the Complaint was filed. Respondent sought to amend its pleadings on the first day of trial, April 15, 1992. The untimely amendment was not allowed.

Res judicata and collateral estoppel relieves parties of the cost and vexation of multiple lawsuits, and conserve judicial resources, and by preventing inconsistent decisions, encourage

reliance on adjudication. However, none of these goals can be accomplished unless res judicata and collateral estoppel are timely raised in the pleadings. By granting the petition for certiorari, this Court can reaffirm the critical importance of timely raising the defenses of res judicata and collateral estoppel in the pleadings.

Petitioner was terminated after a hearing before the Jefferson County Personnel Board; Petitioner appealed the termination to the state court whose review of the case was limited by law to a "review of the record." The petitioner did not have a full and fair opportunity to litigate the claims of discriminatory and retaliatory discharge in the state court. Since the discrimination claim, not the validity of the state agency's decision, is the issue before the federal court, under U.S.C. § 1738 the state court's decision by itself cannot preclude a federal Title VII suit.

For the foregoing reasons, Petitioner, Linda J. Doyle respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNTIED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 15, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-7157
Non-Argument Calendar

D. C. Docket No. CV-91-P-403-S

LINDA J. DOYLE,

Plaintiff-Appellant,

versus

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, JIM GUNTER, H. WILLIAM LACY, PATRICIA N. MOORE, DAVID HATCHER, in his official capacity as Community Development Specialist and Equal Employment Opportunity Officer,

Defendants-Appellees,

JAMES B. JOHNSON, PATRICIA A. HOBANMOORE, RODERICK BEDDOW, JR., DAVID GRAFF, JOHN BONNER,

Defendants.

Appendix A

Appeal from the United States District Court
for the Northern District of Alabama

(January 15, 1998)

Before HATCHETT, Chief Judge, CARNES, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

Appellant sued making multiple claims as to discrimination in her employment. The district court held that the claim for wrongful termination was precluded and ruled for the defendants/appellees as to that claim. The district court ruled in favor of appellant as to the claims of wrongful demotion, low evaluation, discipline for insubordination and suspension for five days and a reduction in pay. Only the ruling on the termination claim is presented here.

We affirm the judgment of the district court for the reasons set forth in its thorough Opinion of April 20, 1994.

Affirmed.

APPENDIX B — ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION ENTERED APRIL 20, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

Case No. 91-P-403-S

LINDA J. DOYLE,

Plaintiff;

-vs.-

JEFFERSON COUNTY ET AL.,

Defendants.

ORDER

For the reasons outlined in the accompanying opinion, this court finds in favor of Defendant on Plaintiff's discharge claim, and in favor of Plaintiff on all remaining claims, those being wrongful demotion, low evaluation, discipline for insubordination and suspension for five days, and reduction in pay.

The period for calculating damages shall extend from the time of the violation until the date of Plaintiff's termination. The court encourages the parties to attempt to resolve the issue of the amount of damages, and ORDERS them jointly to report to the court within 30 days of this order, describing their progress

toward such resolution. If the parties are unable to reach agreement, the court will set a supplemental evidentiary hearing on the issue of damages.

This the 20 day of April, 1994.

s/ Sam C. Pointer, Jr.
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

Case No. 91-P-403-S

LINDA J. DOYLE,

Plaintiff;

-vs.-

JEFFERSON COUNTY ET AL.,

Defendants.

OPINION

Linda J. Doyle sues her former employer, Jefferson County, as well as the Jefferson County Personnel Board and various individuals, alleging that she suffered discrimination based on her race during her employment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*[1] Specifically, Plaintiff alleges that she was demoted, subjected to harassment, given a low evaluation, disciplined for insubordination and suspended for five days, subjected to a

1. Plaintiff's complaint also listed causes of action under the Civil Rights Act of 1866, 42 U.S.C.§§ 1981 and 1983. However, the trial transcript indicates that Plaintiff was suing under Title VII only. Trial Transcript at 13 ("THE COURT: So we are proceeding here only under Title VII? MS. HOLDER: Yes, sir").

reduction in pay, and, finally, terminated on the basis of her race.[2]

After a substantial amount of pretrial motion practice, this case went to trial before Judge U. W. Clemon on April 15, 1992. At the close of Plaintiff's case, Judge Clemon ruled that the Jefferson County Personnel Board was dismissed from the case. Trial transcript at 123.[3] Those proceedings concluded on April 16, 1992, at which time Judge Clemon took the case under submission as of May 18, 1992. On December 31, 1992, Judge Clemon recused himself from the case, and the case was reassigned to this court. This court then offered the parties an opportunity for the presentation of evidence, at which point they agreed, ore tenus, to submit the case for decision on the transcript of the trial that took place before Judge Clemon. Accordingly, this action is currently before this court for final decision.

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2. Plaintiff's complaint also alleges discrimination in the denial of a promotion; however, Plaintiff withdrew that claim at trial. Trial transcript at 17 ("MS. HOLDER: Ms. Doyle would like to withdraw her claim for discrimination based on failure to promote. THE COURT: All right. That claim is hereby withdrawn.").

3. The transcript reads as follows:

> THE COURT. All right. The motion for judgment of dismissal is granted as to the personnel board, and it will remain in the case only as a Rule 19 defendant.

Trial transcript at 123. Earlier in the trial, Judge Clemon had granted summary judgment in favor of the Jefferson County Personnel Board on all counts except Plaintiff's termination. This was the first point during trial at which the question of collateral estoppel was raised. Id. at 11-16.

Appendix B

Preclusion of Discharge Claim

The first issue that this court must address is whether Plaintiff's claim of discriminatory discharge is precluded under the doctrines of res judicata or collateral estoppel. This court is required to accord to a state court's judgment the same preclusive effect that the state's own courts would accord the judgment. 28 U.S.C. § 1738. In *Allen v. McCurry*, 449 U.S. 90 (1980), the Supreme Court emphasized that an exception to this rule would be recognized only if a later statute contained an express or implied repeal; and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 476 (1982), held that Title VII contains no such repeal. Thus, section 1738 applies to the present case.

After her termination in December 1989, Plaintiff appealed the dismissal to the Jefferson County Personnel Board. A hearing before the Personnel Board was held on January 11, 1990, where Plaintiff was represented by counsel; and on January 19, 1990, the Personnel Board upheld Plaintiff's discharge. Plaintiff then appealed to the Circuit Court of Jefferson County, Alabama, where a three-judge panel reviewed the record and heard oral arguments on June 4, 1991. On June 14, 1991, the Circuit Court affirmed the decision of the Personnel Board.

Timing of Assertion of Preclusion Defense

Plaintiff first argues that res judicata is inappropriate here because Defendants failed to plead res judicata as an affirmative defense, and that such failure operates as a waiver of the defense.[4]

4. Res judicata and collateral estoppel are affirmative defenses, see *Exxon Corp. v. Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 507 n.3 (5th Cir. 1980), and as such "must be expressly pleaded and included in the pretrial order or [are] waived." *E.E.O.C v. White and Son Enterprises*, 881 F.2d 1006, 1009 n.4 (11th Cir. 1989) (case involving the affirmative defense of "a bona fide seniority system under § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h)") (citations omitted).

Appendix B

An answer filed by Defendants on January 3, 1992, included two defenses that raise the issue of the effect of any state level proceedings on the case at bar:

> THIRD DEFENSE — ADMINISTRATIVE REMEDIES
>
> To the extent that the Plaintiff's Complaint states a claim against these Defendants upon which relief can be granted, Defendants assert the affirmative defense that the Plaintiff, as a Merit System employee governed by the rules and regulations of the Jefferson County Personnel Board, had the right to appeal her termination to Circuit Court to seek reinstatement, but failed to do so. Defendants assert that the Plaintiff has failed to exhaust her available administrative remedies pursuant to state law.
>
> FOURTH DEFENSE — COLLATERAL ESTOPPEL
>
> To the extent that the Plaintiff's Complaint states a claim against these Defendants upon which relief can be granted, Defendants assert the affirmative defense of collateral estoppel as a bar to Plaintiff's Complaint in that she failed to pursue relief through the State Court.

Answer of Defendants Jefferson County et al., filed January 3, 1992. However, in the trial transcript, Judge Clemon noted that the answer had been filed without leave of court, and stated that the answer "is treated by the court as a nullity." Trial transcript at 276. Further, Defendants' Motion to Amend Pretrial

Order, which asked the count to treat the answer as properly filed or, in the alternative, to allow the Defendants to refile the answer, was denied.

This case, therefore, presents a unique situation, in that a prior state court adjudication exists, yet Defendants have failed properly to raise the affirmative defenses of res judicata and collateral estoppel in any of their pleadings. Despite this failure, Defendants argue that the current action is precluded in this court, on the ground that 28 U.S.C. § 1738[5] creates a jurisdictional obstacle that cannot be waived by a defendant's

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5. Section 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

failure to assert it. Because of the unusual posture of this case, it is unsurprising that there appears to be no precedent directly on point. The former Fifth Circuit described the present issue, but declined to resolve it:

> In applying the doctrine of collateral estoppel by judgment in this case, we are not unmindful of the unsettled nature of the law regarding the respect to be accorded state court rulings in subsequent federal court proceedings. In particular, there appears to exist some difference of opinion whether state court decisions are to be accorded force in the federal courts under the doctrine of collateral estoppel by judgment or under the provisions of Title 28 U.S.C. Section 1738, an expansion of the "Full Faith and Credit" provision of Article IV of the United States Constitution. . . . We intimate no opinion as to the relative merits of one ground over the other, but rely on the doctrine of collateral estoppel because prior precedent in this circuit approves the doctrine.

Parker v. McKeithen, 488 F.2d 553, 558 n.7 (5th Cir. 1974) (citations omitted). Although the former Fifth Circuit did not settle the current question, the mere fact that the court recognized these two avenues as distinct and separate grounds lends support to the Defendants' argument. More recently, in a takings case the Eleventh Circuit spoke of § 1738 in conjunction with the Supreme Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnston City*, 473 U.S. 172 (1985), as presenting a "jurisdictional problem." *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299, 1302 (11th Cir. 1992). Further, in *Kramer v. Chemical Construction Corp.*, the Supreme Court spoke specifically of "the comity

and federalism interests embodied in § 1738." 456 U.S. 461, 478 (1982). These interests are distinguishable from and in addition to the interests of finality and judicial economy normally served by the doctrines of res judicata and collateral estoppel. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.") (citations omitted); *see also* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4403 (1981). This language thus suggests that § 1738 reaches beyond the traditional scope of res judicata and collateral estoppel (as affirmative defenses that may be lost if not pled) to create a jurisdictional limit on federal courts.[6] Unlike an affirmative defense, a defect in subject matter jurisdiction may be raised at any time in a proceeding. *See Drake Towing Co., Inc. v. Meisner Marine Construction Co.*, 765 F.2d 1060, 1064 (11th Cir. 1985). Accordingly, this court finds that this case may be precluded in federal court despite Defendants' failure to raise res judicata and collateral estoppel as affirmative defenses.

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6. Note that § 1738 incorporates state substantive rules of res judicata and collateral estoppel to determine whether "full faith and credit" should be afforded a prior state law judgment. *Kremer*, 461 U.S. at 481-82. This is not inconsistent with this court's reading of § 1738 as creating an unwaivable subject matter jurisdictional limit. Instead, by creating a jurisdictional limit that incorporates state substantive preclusion rules, § 1738 essentially converts res judicata and collateral estoppel into unwaivable jurisdictional defenses in any instance where the prior proceeding occurred in state court. Likewise, this reading of § 1738 would not disturb the requirement of the Federal Rules of Civil Procedure that the defenses of res judicata and collateral estoppel be pled as affirmative defenses, where the prior proceeding occurred in a federal tribunal.

Appendix B

Adequacy of Prior Proceedings

Both *Allen v. McCurry*, 449 U.S. 90 (1980), and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), emphasize that federal courts will not be precluded from hearing a case where a party "did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Allen*, 449 U.S. at 101; *see Kremer*, 456 U.S. at 480-83. In *Gorin v. Osborne*, 756 F.2d 834 (11th Cir. 1985), Cynthia Gorin was discharged from her job, and she filed a complaint with the State Personnel Board protesting the discharge. She then had "a full adversarial hearing [before a hearing officer], in which the parties were represented by counsel and had the opportunity to present and cross-examine witnesses." *Id.* at 835. When the hearing officer found against her, Gorin appealed to the State Personnel Board, which affirmed the decision. Gorin then appealed to the Cobb County Superior Court, which upheld the discharge. When Gorin turned to the federal district court with a § 1983 claim based on the same discharge, the district court granted summary judgment for the defendant, on the ground that the claim was precluded by the earlier proceedings. The Eleventh Circuit upheld the granting of summary judgment, stating that the plaintiff had been accorded the "full and fair opportunity required by *Kremer*. Further, the Eleventh Circuit said that the Georgia court's review of the Personnel Board's decision under an "any evidence" standard in no way contravened *Kremer:*

> Indeed, the *Kremer* Court emphasized that "when a complainant has had a full opportunity to present his evidence and exhibits" before the administrative tribunal — as Ms. Gorin clearly did — then even judicial review confined to a determination of whether there was a "rational basis in the record"

> for the agency decision would constitute a "decision on the merits" and would be entitled to preclusive effect under 28 U.S.C. § 1738.

Id. at 838 *(quoting Kremer,* 456 U.S. at 480-81 n.21).

The case at bar presents a scenario much like that in *Gorin.* Upon her termination from employment with Jefferson County, Plaintiff appealed her discharge to the Jefferson County Personnel Board. At Plaintiff's hearing before the Personnel Board, both sides were represented by counsel, and presented and cross-examined witnesses. The Personnel Board upheld Plaintiff's termination, and Plaintiff appealed that decision to the Circuit Court of Jefferson County, Alabama. As dictated by Alabama law, the Circuit Court reviewed the case under the "substantial evidences" standard, which requires that the administrative body's conclusions have a "rational basis." *See Alston v. Personnel Board of Mobile County,* 523 So.2d 456, 457 (Ala. Civ. App. 1988); *City of Mobile v. Seals,* 471 So.2d 431, 433-34 (Ala. Civ. App. 1985). After reviewing the record and considering arguments of counsel, the Circuit Court concluded that "substantial evidence supports the Board's decision." Order of Circuit Court of Jefferson County, Civil Action No. CV 90-0714, June 14, 1991. Given the similarity of this case with *Gorin,* it is clear that the administrative and state court proceedings in this case afforded Plaintiff with the "full and fair opportunity" required by *Allen* and *Kremer,* and thus are adequate to preclude this action from going forward.

Res Judicata

Because 28 U.S.C. § 1738 incorporates the substantive preclusion rules of the state in which the prior decision was

rendered,[7] a determination of whether the present case is precluded requires an examination of Alabama law. The Alabama Supreme Court has listed four elements necessary for a finding of res judicata:

> (1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was rendered on the merits; (3) the parties to both suits are substantially identical; and (4) the same cause of action is present in both suits.

Tatum v. Kelley, 481 So.2d 1132, 1135 (Ala. 1985) (citations omitted). It appears that each of the four prongs is satisfied in the present case. First, it is undisputed that the Circuit Court for Jefferson County is a court of competent jurisdiction. Second, a Judgment is considered rendered on the merits if it is "general, and not based on any technical defect or objection, and the parties had a full legal opportunity to be heard on their respective claims and contentions." *A.B.C. Truck Lines v. Kenemer,* 25 So.2d 511, 513 (Ala. 1946) (quoting 34 Corpus Juris 776). The Jefferson County Circuit Court's decision to uphold the ruling of the Personnel Board was not based on any technicality; it was based on a review under the "substantial evidence" standard, discussed above. The underlying proceeding of which the Circuit Court made its review — the Personnel Board hearing — was also clearly a merits-based decision. The third element is satisfied because the parties to both actions are identical.

Finally, it is clear that Plaintiff presents the same cause of action here as she did before the Personnel Board and, ultimately, the Jefferson County Circuit Court. In *Ray v. Tennessee Valley Authority,* 677 F.2d 818 (11th Cir. 1982), James Ray had been

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7. See *supra* note 6.

discharged from the TVA as part of a reduction-in-force (RIF). He appealed the dismissal to the Civil Service Commission; when he lost that appeal he filed his first suit in federal court, asking for review of the Commission's decision and alleging that the discharge violated his civil rights under 42 U.S.C. §§ 1983 and 1985. Specifically, he stated that his discharge was based on a difference in religious beliefs from his supervisor at TVA. He lost this case, and his appeal to the Fifth Circuit was dismissed. Ray then made another attempt to get into federal court, by intervening in a race discrimination suit against the TVA. His intervention was denied on the basis of res judicata. Ray then filed suit in federal court, this time alleging that his discharge was improper, that it breached his contract of employment with the TVA, and that it violated his reemployment rights under the Veteran's Preference Act. After losing on summary judgment, Ray appealed to the Eleventh Circuit which held:

> we agree with the district judge that Ray's breach of contract claim is barred by res judicata. In each suit the primary right at issue was Ray's right of continued employment with the TVA, and *in each suit Ray alleged that TVA interfered with that right by terminating his employment through a pretextual RIF.* In substance, if not in form, the breach of contract alleged by Ray in this suit is identical to his claims in the 1974 litigation and thus falls squarely within res judicata doctrine.

Id. at 821-22 (emphasis added). As in *Ray*, Plaintiff here challenges the same action that she challenged in her Personnel Board hearing: her termination. Also as in *Ray*, in both courts she alleges that the action taken against her was based on

pretextual reasons. Further, the case at bar presents an even stronger case for res judicata than that presented in *Ray,* because the present Plaintiff raised the same issues at her hearing as she raises here: that the termination was motivated by race and retaliation. The transcript of the Personnel Board hearing reveals that Plaintiff's counsel raised the issue of harassment and discrimination in her opening statement before the Board. Transcript of Personnel Board Case No. 731 at 4 ("We submit that Ms. Doyle has been harassed by discriminatory practices within the office of Planning and Communication [sic] Development.") (hereinafter "Hearing transcript."). Later in the hearing, when asked by her counsel why she felt disciplinary action was taken against her, Plaintiff responded: "Ah — I think there are probably three reasons. First of all, my race. Secondly, harassment and thirdly, retaliation because of charges I have filed against the agency." Hearing transcript at 86. These facts conclusively indicate that Plaintiff raises in this court the same cause of action that she raised in her earlier proceedings.

Collateral Estoppel

According to the Alabama Supreme Court,

> [t]he elements of collateral estoppel are: (1) an issue identical to the one litigated in the prior suit; (2) that the issue was actually litigated in the prior suit; (3) that resolution of the issue was necessary to the prior judgment; and (4) the same parties.

Dairyland Ins. Co. v. Jackson, 566 So.2d 723, 726 (Ala. 1990) (citations omitted). It appears that each of the four elements exists in the present case. First, Plaintiff raises here issues identical to those she raised in the earlier proceedings: in both proceedings she alleges that her termination was motivated by

race and retaliation. Second, it is clear that the issues were actually litigated in the prior suit. As noted above,[8] the transcript of the Personnel Board hearing reveals that Plaintiff's counsel raised the issue of harassment and discrimination in her opening statement before the Board.

The third element of collateral estoppel is also satisfied: it is obvious that the resolution of these issues was necessary to the decision of the Personnel Board and, ultimately, the Circuit Court. In deciding to sustain Plaintiff's discharge, the Board necessarily had to determine that the discharge was not improper.[9] Discharge based on race or retaliation obviously would have been improper; if the Personnel Board had found Plaintiff's allegations credible, it would not have upheld the discharge. Where an employment decision of the Jefferson County Community Development Department was improper, the Personnel Board has exhibited its willingness to alter those decisions, one example being its October 13, 1989, order modifying the Department's decision to demote Plaintiff. Plaintiff's Exhibit 19. Finally, the fourth element exists here because the parties in both proceedings are the same.

Accordingly, this court finds that Plaintiff's discharge claim is precluded under 28 U.S.C. § 1738, as analyzed through the doctrines of res judicata and collateral estoppel.

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8. See *supra* this page.

9. The court recognizes that this premise cannot be applied generally — ordinarily such an assumption, if held by courts, would block a plaintiff's attack on any Board decision. However, this case warrants such an assumption: Judge Clemon granted the Personnel Board's motion to dismiss at the close of Plaintiff's case. See *supra* note 3. This indicates that any involvement by the Personnel Board in this case entailed no wrongdoing.

Appendix B

Findings on Claims of Discrimination

In her hearing before the Jefferson County Personnel Board that was appealed to the Circuit Court of Jefferson County, Plaintiff raised only the issue of her termination. Accordingly, only her termination claim is precluded in this court, and the remainder of her claims must now be addressed on their merits.[10]

The court acknowledges that reaching a finding regarding the existence of intentional discrimination is an already somewhat difficult task made more troublesome in this case by the necessity of having to rely on the trial transcript and exhibits as the sole sources of evidentiary information. This case is even further complicated by the sheer number of episodes it involves, including adverse employment actions taken against the Plaintiff, alleged incidents of harassment directed at Plaintiff, and alleged shortcomings in Plaintiff's work performance and attitude. However, after having given serious consideration to all of these submissions, this court concludes that there are several key facts that remain undisputed, and on which this case ultimately turns.

The first important fact is that, beginning in 1987, Commissioner Jim Gunter decided to alter substantially the Rental Rehabilitation and Voucher programs.[11] It is arguable

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10. The court further notes that, if Plaintiff's termination claim were not precluded by 28 U.S.C. § 1738, the following analysis would apply to that claim as well.

11. The trial transcript reads as follows:

> Q [from Mr. Wagner]: . . . [D]id you specifically order changes in programs during that time frame in '87-88, '88-89 time frame, Commissioner?

(Cont'd)

whether those alterations affected the programs' marketability to potential clients: Plaintiff testifies that the revised program

(Cont'd)

> A [from Commissioner Gunter]: I did in many of the areas. I did in the Housing Program. . . . I wanted the program to be more in line with the federal guidelines of what the money was intended for. Community Development Block Grant Funds are designed for low to moderate income families. . . . And understanding the goals of HUD and looking at our program, it seemed that the beneficiaries of our Rental Rehab Program were well-to-do, upper income landlords. That they are the ones that were given money to go out and rehabilitate a dilapidated apartment building and the by-product of the program was that low income families got to live there at a fair housing rate. Well, I didn't think the benefit was good enough for low income people. So I wanted to make the wealthy people repay the money and apply it because that pot was dwindling. We just got notice from HUD of an eight percent reduction in those monies. And I wanted that program to continue for poor people. So I wanted the wealthy people to pay it back in the pot so we could loan it out over and over again. . . .
>
> In the area of home rehabilitation, typically a low-income person who owns the home would rehab that house, and we would loan up to fifty percent of it. And if that person lived in that house for five years, then we would forgive the money. It was theirs. It was free. No cost to them. If they moved out prior to the five years, then they would pay a rate of twenty percent of the money, total money back each year that they lived there before they sold it. What was happening is people were borrowing money, rehabing a house and moving out of it, selling the house and keeping the money. And that wasn't benefitting anybody. So I redesigned the program in those . . . areas to get in line with what I thought the objectives of the money was for.

Trial transcript at 299-301.

was less attractive to potential clients;[12] Defendant disagrees. It is undisputed, however, that Gunter's action constituted a change.

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12. For Plaintiff's view, see, e.g., trial transcript at 73-74:

> Q [Ms. Holder]: In June 1989, how would you characterize the Rental Rehab Program?
>
> A [Plaintiff]: We were not, uh — we had tried several marketing strategies for the program, and we could not get participants to borrow the money for the program. Not only did they borrow —
>
> THE COURT: Well, was it that the property owners were reluctant to invest that kind of money in low income areas knowing that all of the money they borrowed would have to be repaid?
>
> . . .
>
> A: Yes, uh, that's correct.

For Defendants' view, see, e.g., trial transcript at 185:

> Q [Mr. Wagner]: Is that the change that was effected?
>
> A [Mr. Lacy]: That was the principal change that was effected.
>
> If I remember correctly, what we asked to happen was that those same investors, instead of now coming in and just receiving fifty percent free money, we would give them the same fifty percent for the costs of rehab, but they would only have to pay back the principal over a five to ten year period, *still making it an attractive investment.*

(emphasis added).

Appendix B

Second, the programs were not operating optimally in 1988.[13]

Third, the ratings that Plaintiff received in her performance evaluations dropped drastically in 1988. On December 17, 1984, Plaintiff received a grade of 90.3, and on October 22, 1986, she received a grade of 90.8. This dropped to 57 on September 9, 1988, and 56.5 on April 26, 1989. Plaintiff's Exhibit 46.

Fourth, H. William Lacy, then Director of the Office of Planning and Community Development, either performed the actual evaluation of Plaintiff or reviewed the evaluation for each of these evaluations. Id.

Fifth, Lacy was the person who appointed Plaintiff to the position of housing coordinator. Trial transcript at 89.

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13. Mr. Lacy testified as follows:

> . . . we were being cited in the HUD findings, in the HUD reports for failing to [move our cases]. And we were not living up to our Housing Assistance Plan.
>
> . . .
>
> . . . HUD had expressed a concern in their 1987 visit relative to the Housing Rebate, the Housing Program, particularly the Deferred Loan Program. Then again in 1988-89, those same concerns were being raised.

Trial transcript at 184.

Sixth, Lacy stripped Plaintiff of her supervisory duties on August 30, 1988, which later resulted in an official demotion.[14]

Finally, on August 31, 1988, Plaintiff filed a charge of discrimination with the EEOC, alleging that she had suffered harassment and discrimination by Lacy on the basis of her race. Plaintiff's Exhibit 14.

These undisputed facts together indicate that, beginning in 1988, Plaintiff's treatment by her supervisors was radically different from that which she had experienced before that time. The difficulty arises in explaining this change in treatment. Defendants argue and testify that it was a result of the poor quality of Plaintiff's work; however, they offer no theory to explain why a highly rated employee would suddenly show such a sudden decline in performance. Plaintiff offers two explanations; first, she argues that the adverse treatment arises

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14. Lacy issued a memorandum to Plaintiff in which he stated:

> Effective immediately, you are relieved of your supervisory responsibilities for the Housing Programs and will report directly to Ms. Pat Moore, along with Bruce Jones and Billy Shipp. We are also relocating your office to a spot so designated by Ms. Pat Moore. You will follow every instruction given to you by Ms. Moore without question.

Plaintiff's Exhibit 24. During the trial of this case, Judge Clemon found that "when [Plaintiff] was stripped of her supervisory responsibilities, she did not suffer an immediate loss in pay, but . . . because she had no supervisory responsibilities, her job was reclassified and graded down." Trial transcript at 87. Following from this, this court finds that the August 30, 1988, memorandum was equivalent to a demotion of the Plaintiff.

from race discrimination. This theory, however, appears just as unlikely as Defendants' position, as it fails to offer the court any explanation for why seemingly fair and nondiscriminatory treatment (in the form of steady promotions and strong evaluations) would suddenly become infected with racial motivation, especially when the actors have remained the same.

Plaintiff's second theory is that this shift in treatment indicates retaliation for the charge of discrimination — and subsequent charges — that she filed on August 30, 1988. This is distinguishable from the view that racial animus sprang up out of nowhere, which this court rejects as implausible; under this view, a specific, new circumstance (Plaintiff's filing of her charge) caused the shift in treatment. This court finds this the likely explanation for the shift in the Defendants' treatment of Plaintiff.

Also noteworthy is the fact that the revision of the housing programs occurred nearly simultaneously with Plaintiff's adverse treatment. This closeness in time suggests that the alterations may also be causally linked to the shift in Plaintiff's treatment. Plaintiff raised this point in her hearing before the Personnel Board, arguing that she had been made a scapegoat for a failing program.[15] Of course, blaming Plaintiff for the failure of an entire program, although arguably an unfair allocation of fault, is not alone an actionable offense. However, the fact that Plaintiff was chosen to be the scapegoat raises suspicion when viewed in light of her several charges of discrimination. This theory, too, therefore, implicates the Defendants as having acted in violation of Title VII.

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15. Hearing transcript at 4 ("We submit that [Plaintiff] is being made a scapegoat — a scapegoat in that she is being blamed for the potential loss of Federal funds allocated to the Rental Rehab Program.")

Appendix B

Conclusion

For these reasons, this court finds that the shift in Defendants' treatment of Plaintiff was in retaliation for Plaintiff's filing of an EEOC charge of race-based discrimination. Such retaliation violates Title VII, 42 U.S.C. § 2000e *et seq.* Accordingly, this court finds in favor of Plaintiff on all remaining counts, those being wrongful demotion, low evaluation, discipline for insubordination and suspension for five days, and reduction in pay. The period for calculating damages shall extend from the time of the violation until the date of Plaintiff's termination. The court encourages the parties to attempt to resolve the issue of the amount of damages, and ORDERS them jointly to report to the court within 30 days of this order, describing their progress toward such resolution. If the parties are unable to reach agreement, the court will set a supplemental evidentiary hearing on the issue of damages.

This the 20 day of April, 1994.

s/ Sam C. Pointer, Jr.
United States District Judge